FILE COPY

Office - Supreme Court, U.S.
FILED
FEB 12 1942
CHARLES ELMORE CROPLEY

(29070)

Supreme Court of the United States

No. 589. October Term, 1941

WILLIAM JACOB,
Petitioner,
against
THE CITY OF NEW YORK.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

February 11, 1942.

WILLIAM C. CHANLER,
Corporation Counsel
of the City of New York,
Counsel for Respondent,
Municipal Building,
New York, N. Y.

PAXTON BLAIR,
ALFRED T. WHITE,
DEON SHAW,
of Counsel.

OUTLINE OF ARGUMENT

PAGE

Statement 1

The pleadings 2

Questions presented 3

Facts 4

1. The actual happening of the accident 4
2. The extent of plaintiff's experience with wrenches 6
3. Availability of other wrenches 7

Statutes involved 7

Opinion below 8

Argument 8

POINT I—A plaintiff in an action under the Jones Act is required to prove that negligence on the part of the shipowner was the cause of the injuries sustained 9

POINT II—Evidence that the defendant furnished, among other wrenches, one which had, through wear, a play of 1/16 of an inch in the jaws, does not constitute proof of negligence 11

1. In determining whether negligence was proved, the plaintiff's familiarity with this particular wrench gained through its repeated use, is a factor of primary importance 11
2. By the weight of authority, it is not negligence to provide, among several others, a loose-jawed wrench, which the employee might select 12
3. The "simple tool doctrine", which extends to maritime cases, is well established by authority, and was properly relied on by the Courts below in giving judgment for the defendant 15

PAGE

4. The decision below does not conflict in any way with the decision in *Socony-Vacuum Oil Co.* v. *Smith*, 305 U. S. 424 21

POINT III—Since the plaintiff had complete familiarity with the type of wrench furnished for the work he was doing and testified himself that it was the kind customarily and generally employed for the purpose at hand, it was not error to exclude opinion testimony as to the superior merits of another type of wrench 22

Conclusion 24

Table of Cases Cited.

Allen Gravel Company v. Yarbrough, 133 Miss. 652, 98 So. 117 ..... 16, 21

Beadle v. Spencer, 298 U. S. 124 10
Birkenhead, The, 51 F. (2d) 116 ..... 12, 16, 17

Coast S. S. Co. v. Brady, 8 F. (2d) 16; 269 U. S. 578 14
Cregan v. Marston, 126 N. Y. 568 15
Cricket, The, 71 F. (2d) 61 23

Escandon v. Pan-American Foreign Corporation, 88 F. (2d) 276 11

Field v. Waterman S. S. Corp., 104 F. (2d) 840 17

Garnett v. Phoenix Bridge Company, 98 Fed. 192 13

Hedicke v. Highland Springs Co., 185 Minn. 79, 239 N. W. 896 ..... 19, 21
Hedley v. Pinkney & Sons Steamship Co., [1894] App. Cas. 222 18

Ireland v. E. J. Pinney, Inc., 91 N. H. ..., 18 Atl. (2d) 750 18

Kilday v. Jahncke Dry Dock & Ship Repair Co., 281 Fed. 133 ..... 16, 17,
Kunschman v. United States, 54 F. (2d) 987 10

PAGE

Marsh v. Chickering, 101 N. Y. 396 ..... 12, 15, 23
Marshall v. International M. M. Co., 39 F. (2d) 551 3
Newbern v. Great Atlantic & Pacific Tea Co., 68 F. (2d) 523 ..... 19, 21
O'Brien v. Missouri, Kansas & Texas Ry. Co., 36 Tex. Civ. App. 528, 82 S. W. 319 13
O'Hara v. Brown Hoisting Machine Company, 171 Fed. 394 15
Pacific Steamship Company v. Peterson, 278 U. S. 130 ..... 3, 10
Panama R. R. Company v. Johnson, 264 U. S. 375 9
Phillips v. Chicago, Burlington & Quincy R. Co., 119 Neb. 182, 227 N. W. 931 ..... 11, 23
Pittsburgh Steamship Company v. Palo, 64 F. (2d) 198 ..... 11, 17, 21
Plamals v. Pinar Del Rio, 277 U. S. 151 17
Socony-Vacuum Oil Company v. Smith, 305 U. S. 424 ..... 18, 21, 22
Tawmie, The, 80 F. (2d) 792 23
Wisconsin Railroad Comm. v. Chicago, Burlington & Quincy R. Co., 257 U. S. 563 23
Wong Bar v. Suburban Petroleum Transport, Inc., 119 F. (2d) 745 22

Other Authorities.

American Law Institute's Restatement of the Law of Agency 15
American Jurisprudence 19
Corpus Juris 19
Employers' Liability Act (35 Stat. 65) 7, 9, 11
Jones Act (41 Stat. 1007) 1, 2, 7, 8, 9, 11, 18
Ruling Case Law 19

Supreme Court of the United States

No. 589. October Term, 1941

WILLIAM JACOB,
Petitioner,
against
THE CITY OF NEW YORK.

RESPONDENT'S BRIEF.

The plaintiff has obtained a writ of certiorari to review a judgment of the United States Circuit Court of Appeals for the Second Circuit, unanimously affirming so much of a judgment of the United States District Court for the Southern District of New York (MEEKINS, J.), as dismissed, at the close of the plaintiff's case, the first cause of action in a complaint brought to recover for bodily injuries. The Circuit Court of Appeals, however, directed the entry of judgment in favor of the plaintiff for wages lost. The action was begun under the Jones Act by a member of the crew of a municipally owned ferry-boat, who, while the vessel was in the navigable waters of the United States, lost his balance and fell from a platform, eighteen inches high, striking a railing and breaking three ribs. At the moment of the mishap he was tightening with a wrench the nuts on a manifold head (R. 11), which he was replacing after having cleaned the strainers housed in it; and the cause assigned was the presence of a "play" of 1/16 of an inch in the jaws of the wrench, so that it slipped under the torque applied to it, throwing the man off his balance.

The fundamental issue is whether, in allowing a wrench with this defect, slight though it was, to remain aboard the vessel, so that a workman could select it from a group of wrenches and use it, was negligence on the defendant's part.

The opinion below, answering this question in the negative, is reported in 119 F. (2d) 800.

The Pleadings.

(1)

The essence of the complaint is found in Par. EIGHTH, which alleges (R. 3):

> "EIGHTH.—That on the aforesaid date, while the ferryboat was at the place aforesaid, plaintiff was changing oil strainers, and, while in the course of his said employment, suddenly and without notice the wrench with which he was working slipped and plaintiff was caused to be precipitated from and fall off a platform * striking and landing on a catwalk or grating with such great force and violence as to sustain serious, severe and permanent personal injuries."

Negligence is alleged in Par. TENTH and is said to reside in the fact that (R. 3)

> "the defendant failed to provide plaintiff with a safe and seaworthy vessel and with a safe and proper place in which to work, and it failed to keep the vessel, its gear, appliances, equipment and devices in a safe and proper condition and in a sane and proper state of repair; that the said ferryboat, its gear, appliances, tools and devices were old, worn and defective, and unfit for use; that the defendant failed

* Not a very high platform. Its height was 18 inches (R. 11).

to take such care and caution as was necessary to protect the safety of plaintiff's life and limb."

(2)

The answer consists of a general denial, coupled with an admission of a statutory liability for lost wages, and maintenance and cure,* and an affirmative defense, which was that plaintiff's injuries (R. 5)

> "were suffered or sustained through the negligence of the plaintiff or through the intervention of a cause or causes over which the defendant, its agents, servants or employees had no control or in no wise are or were responsible therefor."

Questions Presented.

We are not ready to concede the accuracy of the petitioner's statement of the issues, outlined at page 7 of his brief. He indulges in unwarranted assumptions as to underlying facts. We submit that the issues are (1) whether in actions under the Jones Act negligence must be proved to sustain a recovery; (2) whether, assuming such proof is essential, the burden was met by merely showing that the defendant furnished to a workman, or exposed to his selection, a number of wrenches one of which had the defect, not only patent but known to plaintiff, of slightly worn jaws; and (3) whether the petitioner had the right to put in opinion testimony that the best type of wrench for the work the plaintiff was doing was a wrench of a type which had never been in use for that work.

---

* Of course the shipowner's liability for lost wages, maintenance and cure is contractual in its origin, and is not dependent on negligence. *Pacific Steamship Company* v. *Peterson*, 278 U. S. 130, 137 (1928); *Marshall* v. *International M. M. Co.*, 39 F. (2d) 551, 553 (2nd Circ., 1930).

Facts.

1. The actual happening of the accident.

The plaintiff, just before the accident, was working in the boiler room, starboard side, changing oil strainers. He was acting in the capacity of water-tender in charge of the boiler-room, and was not acting under the orders or supervision of another but was in full control of the work, with unrestricted power to select the tools and methods for the best accomplishment of his task (R. 23-24). The process of changing oil strainers required him to remove the head of the manifold, which apparently housed several strainers; and this process, in turn, required removing and replacing certain nuts and bolts. He then said (R. 11):

> "Q. How many bolts or nuts did you have to move to take off the strainer? A. Six.
>
> Q. What did you stand on doing that? A. We had a platform there about 18 inches square.
>
> Q. How high? A. About 18 inches off the catwalk.
>
> The Court: The standing room is 18 inches square?
>
> The Witness: Yes.
>
> Q. You mean it was a square box 18 inches square? A. Yes."

As to the accident itself, he said (R. 12):

> "Q. And you were using a wrench when something happened? A. That is right.
>
> Q. What happened? A. In taking off these bolts and putting them on they have to be very tight, and I put a strain on them and the wrench slipped and I had nothing to grab * and I fell and hit an angle iron.

---

* On cross examination (R. 25), he admitted he did have an iron rod on which to hold.

Q. Will you describe that wrench? A. The wrench was well worn.

Q. What do you mean? A. It had seen a lot of service. It had a lot of play on it."

But the "lot of play" was defined a little later as merely 1/16 of an inch; for he went on to testify (R. 16):

"A. There was play in the jaws; it was worn.

Q. How much play was there? A. A sixteenth of an inch."

The wrench was not an adjustable wrench, but an open-end, S-shaped wrench, and the jaws which were being used were formed to fit a ¾ inch nut. The plaintiff was specific in stating, and his counsel in conceding, that he attributed the accident only to the condition of the wrench (R. 13, 15), viz., the above mentioned "play" in the jaws, which made it a "loose fit".

In spite of the attempt to relate the accident to a particular condition of a particular wrench, the plaintiff on cross examination admitted that any wrench, good or bad, would sometimes slip, for he said (R. 26):

"Q. In your experience hadn't you found before if you put that much strain on a wrench on a nut it is very apt to slip, any wrench or any nut? Isn't that true? A. Yes.

Q. And that is particularly true when the nut has been in use before and the wrench has been in use before? A. That is true.

Q. That is the usual course of experience, isn't it? A. That is right.

Q. Nothing odd about that. As a matter of fact, you have worked around machinery for how long? A. About 20 years.

Q. And this is not the first time you have had a wrench slip off a nut? A. Probably not.

Q. It happens all the time; it happens every so often, doesn't it? A. Oh, no.

Q. Well, wrenches slip off nuts for a number of reasons?

The Court: You have been over that. He says they do."

And it would seem that the likelihood of slipping increases as the tightening progresses, for he said (R. 26):

"Q. How many times did you change the wrench on the nut while you were tightening it up? A. I got about four tightenings before the thing slipped.

Q. In other words, you turned it so far and put it back on and turned it again? A. Yes.

Q. How much thread was there on this bolt? A. About 5/8.

Q. 5/8ths of an inch? A. Yes, sir.

Q. Was there as much thread as there was on this bolt you have in front of you—I mean the nut? A. Just about.

Q. So in all you changed your wrench on the—

The Court: He said he did four times at least.

Q. Four or five times? A. Yes.

Q. Did you do it four times before you put it on the last time?

The Court: That is what he said."

2. The extent of plaintiff's experience with wrenches.

The plaintiff had done this kind of work on municipally owned ferryboats for twenty years (R. 9). The particular job of cleaning strainers, and hence of incidentally removing and replacing manifold heads, *with this very wrench* (R. 25), he had been doing three times a week for about three weeks (R. 12).

3. Availability of other wrenches.

Asked whether there were any other wrenches on the vessel that would fit a ¾ inch nut, he at first said that there were not (R. 14). But this inherently unlikely story was repudiated on cross examination, for he said (R. 23-24):

> "Q. Did he have what is commonly called monkey wrenches? A. I believe he did.
>
> Q. Of course, you can use that on any nut? A. Probably.
>
> Q. You have used them lots of times yourself, haven't you? A. Yes.
>
> Q. You have used monkey wrenches and Stillson wrenches lots of times on all kinds of nuts, haven't you, and you say this nut [Pl. Ex. 1 for ident., R. 16] was just like the nut you were working on? A. Yes, sir."

He thus admitted that other wrenches were available, and he had previously said that when he asked for a new, open-end wrench, the engineer, he believed, had "said he sent an order out for one" (R. 14).

Moreover, this ferry-boat docked in New York and in Staten Island six or seven times a day (R. 24), and if he had been in any real need of a new wrench he could have gotten one.

He stated dogmatically that an open-end wrench was the type generally used for removing the studs or nuts on strainers and cylinder heads (R. 16), a fact to which we shall recur in Point III, *post*.

Statutes Involved.

The text of the pertinent statutes (41 Stat. 1007, § 33; and 35 Stat. 65, § 1) is correctly given in petitioner's brief, pp. 19-20.

Opinion Below.

The Circuit Court of Appeals handed down an opinion *per curiam*, in which they stated briefly (1) that proof of negligence was part of the case of a plaintiff suing under the Jones Act; (2) that the simple tool doctrine applied; and (3) that the dismissal of the complaint was proper, not because of any negligence on the plaintiff's part, nor because of any assumption of risk by him, but because the plaintiff had not proved negligence on the defendant's part. They stressed these facts (R. 45-46):

> "In the case at bar, the plaintiff was at liberty to select such tools as he thought suitable for the work in hand; he was not acting under orders in using the worn wrench; if the wrench was in such condition that he thought its use dangerous, he was under no necessity of using it, for a monkey wrench, admittedly suitable, was at hand."

The Court referred to the "irritable refusal" of petitioner's counsel to take a judgment for lost wages, and *sua sponte* awarded him a judgment on that cause of action, while affirming a denial of relief on the cause of action for negligence.

Argument.

Upon the record as outlined above, we shall argue as follows:

1. A plaintiff in an action under the Jones Act is required to prove that negligence on the part of the shipowner was the cause of the injuries sustained.

2. Evidence that the defendant furnished, among other wrenches, one which had, through wear, a play of 1/16 of an inch in the jaws, does not constitute proof of negligence.

3. Since the plaintiff had complete familiarity with the type of wrench furnished for the work he was doing, and testified himself that it was the kind customarily and generally employed for the purpose at hand, it was not error to exclude opinion testimony as to the superior merits of another type of wrench.

POINT I.

A. plaintiff in an action under the Jones Act is required to prove that negligence on the part of the shipowner was the cause of the injuries sustained.

The Court will recall that the scheme of the two statutes from which the plaintiff's right is derived, is to extend to seamen the common-law rights and remedies to recover for personal injuries which are enjoyed by employees of common carriers by railroad in interstate or foreign commerce. The Federal Employers' Liability Act, in both the caption and the body of § 51, refers specifically to the liability of carriers for injuries to employees from "negligence". And his counsel, in drafting the complaint, took pains to allege negligence specifically (Par. TENTH, fourth line [R. 3]).

It would seem clear beyond argument, therefore, that when a seaman elects to sue under the Jones Act, which incorporates by reference the Employers' Liability Act, he is required to prove negligence as defined by the common-law. In fact, one of the earliest cases attacked (unsuccessfully) the constitutionality of the Jones Act, on the theory that Congress could not bring into the maritime law common-law rules of liability. See *Panama R. R. Company* v. *Johnson*, 264 U. S. 375 (1924). In this case the plaintiff sought to recover damages for personal injuries, "charging that the

injuries resulted from negligence of the employer in providing an inadequate ladder * * * "(p. 382). The Court, because of the obvious inadequacy of the tool furnished, affirmed a judgment in the plaintiff's favor and pointed out that since Congress had, under the constitution, the power to alter, qualify or supplement maritime rules, there was no reason why it might not bring into them "relative conformity to the common-law rules or some modification of the latter, if the change be country-wide and uniform in operation" (p. 388).

In *Pacific Steamship Company* v. *Peterson*, 278 U. S. 130 (1928), the Court, in discussing the alternatives open to a seaman under the Jones Act, expressly referred to "the right under the new rule to compensatory damages for injuries caused by negligence" (pp. 136-137), and pointed out wherein it differed from preexisting rights enjoyed by seamen under the maritime law. The clear import of this language, therefore, is that when the seaman elects to sue under the Jones Act, proof of negligence is essential to his recovery.

The *Peterson* case by the way, held that a plaintiff had the right to do that which was done by the plaintiff in the case at bar, to-wit, combine in one complaint a cause of action under the Jones Act for personal injuries based on negligence, with a cause of action under the general maritime law for loss of wages, maintenance and cure.

In *Beadle* v. *Spencer*, 298 U. S. 124 (1936), the Court referred to the Jones Act as a statute "which specifically imposes [on shipowners] liability for negligence of officers and fellow employees, and for defects in equipment due to negligence" (p. 128).

The decisions of this Court were subjected to careful scrutiny in *Kunschman* v. *United States*, 54 F. (2d) 987 (2nd Cir., 1932). The proof which a seaman was required

to put in before he could recover under the Jones Act was thus stated (p. 989):

> "• • • it is not enough to show that the ship was unseaworthy, but it must appear that the death was caused by negligence chargeable in law to the employer."

It seems hardly necessary to add that when the word "negligence" was used in the Federal Employers' Liability Act and carried by cross-reference into the Jones Act, we are to look to the common law for the conventional definitions of negligence. It was so held in *Escandon* v. *Pan-American Foreign Corporation*, 88 F. (2d) 276, 277 (5th Circ., 1937), and in *Pittsburgh Steamship Company* v. *Palo*, 64 F. (2d) 198, 200 (6th Circ., 1933), both of which exhibit careful attention to the decisions of this Court and employ reasoning which should commend itself to this Court. See also *Phillips* v. *Chicago, Burlington & Quincy R. Co.*, 119 Neb. 182, 227 N. W. 931 (1929).

POINT II.

Evidence that the defendant furnished, among other wrenches, one which had, through wear, a play of 1/16 of an inch in the jaws, does not constitute proof of negligence.

1. In determining whether negligence was proved, the plaintiff's familiarity with this particular wrench, gained through its repeated use, is a factor of primary importance.

No authority need be cited for the proposition that in determining whether a defendant has or has not been negligent, the inquiry cannot be conducted *in vacuo* but only in the light of relevant factors—one of which is the plain-

tiff's own attributes and capacities.* A companion-way for passengers, for instance, must be more carefully constructed and better equipped with protection against slipping, than a companion-way to which only the crew have access. The agility of a sailor exceeds that of the average passenger.

So here, whether negligence on defendant's part was the cause of the accident, must be determined in the light, *inter alia*, of these factors:

(*a*) the plaintiff had been doing this kind of work on municipal ferryboats for 20 years (R. 9);

(*b*) he had been working for three weeks with the very wrench he had in his hand when injured (R. 25);

(*c*) he had performed the very operation of removing and replacing the manifold nine times without misadventure of any sort (R. 12-13).

2. By the weight of authority, it is not negligence to provide, among several others, a loose-jawed wrench, which the employee might select.

Strikingly similar on its facts to the case at bar is *The Birkenhead*, 51 F. (2d) 116 (D. C., E. D. Pa., 1930). Here the seaman was injured when the slipping of a monkey wrench threw him off his balance. The Court stated the issue thus (p. 117): "Is unseaworthiness established by evidence that a defective appliance was supplied at a place where the libelant would naturally select it for his use, there being plenty of sound appliances adapted to the same work on board and readily accessible to the libelant?" The Court found, as facts, that other wrenches were available

*The New York cases take this view. See *Marsh* v. *Chickering*, 101 N. Y. 396, 399-400 (1886).

(as both Courts below did in the case at bar [R. 32, 35, 36, 45, 46]), and also that a monkey wrench was a proper and reasonably safe appliance for the work the libelant was doing when injured. Recovery for the injury was denied, but, as in the case at bar, the libelant recovered for lost wages, maintenance and cure, since the shipowner's liability in this regard is contractual and not based on negligence or unseaworthiness.

In *Garnett* v. *Phoenix Bridge Company*, 98 Fed. 192 (C. C. E. D. Pa., 1899), the plaintiff was injured when a wrench, with which he was tightening a bolt, unexpectedly opened, causing him to lose his balance and fall, sustaining injuries. The Court, after entering judgment for the defendant, denied plaintiff's motion for a new trial and said (p. 195):

> "• • • I am of opinion that, where the implement, though defective, might, and commonly and generally would, be used without the slightest risk, the master is not called upon to apprehend the occurrence of an extraordinary mishap which he could not have reasonably contemplated as a probable consequence of the existence of the defect."

The Court added (p. 196):

> "• • • the notion that the conductors of the vast industrial enterprises which distinguish our age and country are deficient in ordinary prudence if they do not take care that none of the many to whom they give employment shall be hurt through the breaking of a handsaw, a hammer, or a wrench, is repugnant to common sense and defamatory of the law."

In *O'Brien* v. *Missouri, Kansas & Texas Ry. Co.*, 36 Tex. Civ. App. 528, 82 S. W. 319 (1904), an employee in a machine shop was injured when a wrench with loose jaws

slipped off of the nut, causing him to lose his balance and fall. The Court denied recovery and said (p. 531):

> "If it can be said under this evidence the wrench was furnished plaintiff by defendant, still we are of the opinion no duty of inspection on the part of defendant was shown. During the trial four witnesses, who qualified as expert machinists and examined the wrench identified by plaintiff, testified 'that it appeared to have been of the proper material and properly made originally, but was simply worn out; that the sides appeared to have been worn, thin and weak by constant friction; that they would consider it an old, wornout wrench, and that they could see no other defect in it.' We are of the opinion that defendant in leaving a wornout wrench on the floor of the roundhouse, could not reasonably have anticipated or foreseen that the plaintiff or any other employé would, under the facts shown, make use of the same, and as a result sustain an injury."

Coast S. S. Co. v. *Brady*, 8 F. (2d) 16 (5th Circ., 1925), cert. den. 269 U. S. 578 (1925), cited by Petitioner (brief, pp. 12-13), is readily distinguishable. The wrench there furnished was stated by the defendant's own witnesses to be unfit for the purpose the seaman was trying to accomplish; for the wrench was a flat, open-end one, and the nuts were inset or depressed beneath the surface of the plate they held in place.

In the instant case, the plaintiff admitted the entire adequacy of the type of wrench supplied (*ante*, p. 7).

3. The "simple tool doctrine", which extends to maritime cases, is well established by authority, and was properly relied on by the Courts below in giving judgment for the defendant.

(a)

A clear statement of the simple tool doctrine is found in the American Law Institute's *Restatement of the Law of Agency*, Vol. 2, § 503, comment *d* (pp. 1180-1181):

> "*d. Duty of inspection on user.* A master is not liable for harm caused by instrumentalities used by the servant if the servant is given the opportunity and has the capacity to inspect and to test them before use, or could readily see their defects, except where the agent relies, as the master has reason to know he would, upon a prior inspection by the master. Hence, in the case of simple tools, the defects in which are readily observed by the servant using them, or discoverable by simple tests, the master is not subject to a duty to inspect them.
>
> Likewise, if the master provides safe instrumentalities, he is not liable if a servant, after proper instruction and an opportunity for examination, selects an unsafe instrumentality which is also supplied."

See also *Marsh* v. *Chickering*, 101 N. Y. 396, 400 (1886); *Crégan* v. *Marston*, 126 N. Y. 568 (1891). As was said in *O'Hara* v. *Brown Hoisting Machine Company*, 171 Fed. 394, 396 (3rd Circ., 1909):

> "To fasten on the master the duty of inspection with respect to such common and ordinary tools would place an undue and frequently insupportable burden on his shoulders, unreasonable to require and forbidden by the exigencies of business."

There can be no doubt that a wrench is a "simple tool". *The Birkenhead, supra.* See also *Allen Gravel Company* v. *Yarbrough*, 133 Miss. 652, 98 So. 117 (1923). Here the plaintiff below was tightening bolts holding in place the plates connecting the rails of a railroad track, using an open-end wrench with a long handle. The wrench had become worn, and on the occasion of the injury it had suddenly slipped, causing the employee to lose his balance and fall. The Court reversed a judgment for the plaintiff and directed the entry of judgment for the defendant, saying (p. 658):

> "The appellant presents as his assignment of error that he should have had a peremptory instruction on the theory that the wrench was a 'simple tool,' and that there was no negligence on the part of the master in furnishing a 'simple tool,' and that consequently there was no breach of duty upon which the negligence could be predicated. Is the track wrench above described a 'simple tool'? In our opinion it is. The wrench above described is as simple as the ordinary wrench used in the common and simple affairs of life, such as sewing machine wrench, wagon or buggy wrenches, or similar wrenches used for loosening or tightening nuts. In our view the tool is very simple. Its condition may be seen at a glance. The slightest inspection will disclose its condition. There is no complication whatever about it. The fact that the wrench was used in an employment which was not common to all persons makes no difference in this respect. It is true that it is larger than the ordinary tool used around a household, but its principle of construction is no different, and the only difference is that a great force is to be used and applied in the case of a track wrench."

(b)

In applying the doctrine to a maritime case, the Court below had the sanction of authority. See *Kilday* v. *Jahncke*

Dry Dock & Ship Repair Co., 281 Fed. 133 (5th Circ., 1922); *Pittsburgh S.S. Co.* v. *Palo*, 64 F. (2d) 198 (6th Circ., 1933); *Field* v. *Waterman S.S. Corp.*, 104 F. (2d) 840 (5th Circ., 1939); *The Birkenhead, supra*, page 12.

In *Kilday* v. *Jahncke Dry Dock & Ship Repair Co., supra*, the libelant was cutting off the ends of rivets with a chisel. A chip broke off from the blade and injured his eye. He sued in admiralty and alleged negligence in the defendant's failure to test the chisel. The Court affirmed an order sustaining an exception to the libel and said (p. 133):

> "The general rule that it is the duty of the master to supply the servant with safe tools and appliances is subject to a well-established exception in case of common and simple tools and appliances. Upon the theory and for the reason that the servant has as good opportunity for ascertaining defects in simple tools, such as a chisel, as the master has, the law relieves the master of the duty which it imposes upon him, where he furnishes complicated tools or machinery for the use of his servant. We are of opinion, therefore, that the decree of the court below was correct."

(c)

We may add that there is a further factor exculpating the defendant at bar besides the simple tool doctrine—to-wit, the circumstance that several other admittedly adequate wrenches were available (see *supra*, pp. 6-7). The *causa causans* of the accident at bar was the plaintiff's choice of a worn wrench, and his subjection of it to a greater strain than was consistent with safety and prudence, given its worn character (R. 25-26). This principle was exemplified in *Field* v. *Waterman S.S. Corp.*, 104 F. (2d) 849 (5th Circ., 1939), where plaintiff chose a defective stage from several that were available; and in *Plamals* v. *Pinar*

Del Rio, 277 U. S. 151, 155 (1928), where the mate "selected a bad rope when good ones were available". See also *Hedley* v. *Pinkney & Sons Steamship Co.*, [1894] App. Cas. 222, 228, holding a vessel not rendered unseaworthy where it had aboard all the equipment necessary for safety but it was not availed of by the crew.*

See also *Ireland* v. *E. J. Pinney, Inc.*, 91 N. H. , 18 Atl. (2d) 750 (1941).

(d)

The petitioner is in error in asserting in his brief (pp. 17-18) that the application of the simple tool doctrine to the facts at bar involves necessarily imputing to the seaman an assumption of risk, contrary to the rule announced by this Court in *Socony-Vacuum Oil Company* v. *Smith*, 305 U. S. 424 (1939), discussed *post*, p. 21.

It will be seen that there is not involved in the simple tool doctrine anything akin to the assumption of risk doctrine. Hence when the Jones Act abolished the defense of assumption of risk, the simple tool doctrine was not impaired or affected in any way. Moreover, the assumption of risk doctrine was not invoked in this case and is not necessary to the decision.

The petitioner's argument to the contrary betrays a misconception of the considerations behind the formulation of the simple tool doctrine. These considerations were not that the employé assumed the risk consequent upon using a defective tool, but that it was primarily the employé's duty to remedy the defect (which he had greater opportunities to discover than the employer), or avoid the use of the tool in

* Here to permit seamen to traverse the deck in safety, stanchions and rails should have been erected by the crew across the openings in the bulwarks from an available supply but were not. The shipowner was held not liable for the death of a seaman swept overboard as a result of the failure to set the stanchions and rails in place.

question. This was made perfectly clear in *Newbern* v. *Great Atlantic & Pacific Tea Co.*, 68 F. (2d) 523 (4th Circ., 1934), where the Court, affirming a judgment for defendant in an action by an employé injured when a wheel came off of a floor scale, said (p. 525):

> "• • • this duty [on an employer's part to see that appliances are in safe condition] does not ordinarily exist with respect to simple tools from the use of which no danger is reasonably to be apprehended or as to which the employee is in a better position than the master to discover defects. 39 C. J. [tit. Master and Servant, § 462] 342; 18 R. C. L. [tit. Master and Servant, § 74] 563 †. • • •. This is true, not because the employee assumes the risk of injury from defects in such tools, but because the possibility of injury is so remote as not to impose upon the master the duty of seeing that they are free from defects in the first instance or of inspecting them thereafter. The fact that the employee has better opportunity than the master to judge of the defects of such tools, that no inspection is necessary to discover such defects, and that no danger is to be apprehended which the employee cannot guard himself against, renders it unnecessary in ordinary cases that the master exercise with respect to simple tools the care that the law requires with respect to more complicated machinery. With respect to simple tools, ordinarily the master is not relieved of responsibility because the servant assumes the risk, but the servant assumes the risk because the master is relieved of responsibility, • • •."

In *Hedicke* v. *Highland Springs Co.*, 185 Minn. 79, 239 N. W. 896 (1931), plaintiff, while handling carboys of water in wooden cradles, ran a splinter in his hand, because one of the slats was loose and broken. In holding there was

† See for a modern (1941) restatement of this text, 35 Am. Jur., tit. Master & Servant, § 143, page 573.

no proof of negligence and no right in the plaintiff to recover, the Court held that the simple tool doctrine was not premised on assumption of risk but rested (p. 83)

> "upon the theory that as to such a tool the master owes the servant no duty to inspect for the purpose of discovering whether the ordinary use had produced some defect therein which would endanger the user. If there is no duty to discover and remedy such defects, of course there can be no negligence inferred from the mere proof that defects developed in the use of a simple appliance."

It would seem that the real reason why the simple tool doctrine does not involve assumption of risk is that the phrase "assumption of risk" refers to extraordinary risks created or enhanced by the master's negligence, the responsibility for which is primarily the master's. The result in cases where the assumption of risk defense applies is that recovery is barred in spite of the master's negligence where it is shown that the servant knew of the master's negligence and the consequent enhancement of the risk, but nevertheless continued in the employment. But where the primary duty to detect defects in simple tools is the employé's and not the master's, the retention on the premises of a tool with an undetected defect is not negligence on the master's part. The duty to guard against the possibility of injury is the employé's, *ab initio*, originally and not derivatively, by virtue of the imposition on his own shoulders of the duty of detection.

The assumption of risk doctrine must presuppose a finding of negligence on the part of the master. Hence it is not applicable or necessary here, since the evidence does not establish negligence on the part of the respondent but, on the contrary, a freedom from negligence, as both Courts below found (R. 39-41, 45). In other words, the Circuit

Court of Appeals in the case at bar was eminently sound when it said (R. 45):

> "The master's freedom from liability is not because the employee has been negligent or has knowingly assumed the risk—both contributory negligence and assumption of risk being excluded as defenses under the Jones Act—but because the master has been guilty of no negligence with respect to the tool used by the employee."

The cited cases, especially the *Newbern*, *Pittsburgh Steamship*, *Allen Gravel*, and *Hedicke* cases, *supra*, show the utter lack of soundness in the petitioner's argument (Brief, p. 11) that the simple tool doctrine applies only to tools defective in manufacture or construction, and not to tools which have become defective through wear.

4. The decision below does not conflict in any way with the decision in *Socony-Vacuum Oil Co.* v. *Smith*, 305 U. S. 424.

In *Socony-Vacuum Oil Co.* v. *Smith*, 305 U. S. 424 (1939), the plaintiff-respondent was injured by a step in the engine room, which he knew to be defective. Its condition was due to the negligence of the shipowner, who had two to three weeks* notice of it and did nothing; and, under the applicable statute, the duty to guard against injury from defects in the structure of the ship clearly rested with the owner. As the seaman, however, knew of the defect in the step, the comparative negligence rule was applied. Furthermore, in the *Socony-Vacuum* case the plaintiff had no knowledge of the existence of a feasible alternative method of fulfilling his mission without using the defective step.

---

* In the case at bar the City had only two days notice of the fact that the wrench had become worn (R. 24), and had apparently ordered a new one (R. 14).

In the case at bar, the plaintiff knew of the availability of other wrenches suitable for the purpose.

The *Socony-Vacuum* case was cited in *Wong Bar* v. *Suburban Petroleum Transport, Inc.*, 119 F. (2d) 745 (2nd Circ., 1941), decided two weeks after the case at bar, by the same panel of Judges. But there the plaintiff's fall was attributable not to his use of a defective ladder, for it was adequate if held, but to his fellow-servant's conduct. The latter had been holding the ladder for the plaintiff but suddenly let go when plaintiff's ascent was half completed.

In the instant case, we have shown that under the simple tool doctrine no negligence is chargeable to the shipowner. No occasion arises for applying the comparative negligence rule when only one party is chargeable with negligence.

POINT III.

Since the plaintiff had complete familiarity with the type of wrench furnished for the work he was doing, and testified himself that it was the kind customarily and generally employed for the purpose at hand, it was not error to exclude opinion testimony as to the superior merits of another type of wrench.

We regard this point as frivolous. The plaintiff himself was asked (R. 16):

> "Q. What kind [of wrenches] are generally used for removing studs on strainers and cylinder heads?"

The Court interpolated "Do you know?" and he—a man with 20 years' experience (R. 9)—answered (*ibid.*):

> "Yes; a straight open end wrench."

The plaintiff himself having resolved, clearly and unequivocally, the factual issue raised by his own counsel, it seems absurd to argue that he should be later allowed to

resuscitate a dead issue and *create* doubt by calling a witness to give contradictory opinion testimony (R. 30). We may say, in general, of opinion evidence what this Court said of extrinsic aids to statutory construction (in *Wisconsin Railroad Comm.* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, 589 [1923]), that it is "only admissible to solve doubt and not to create it".

Moreover the rejected testimony was tendered for the purpose of proving a counsel of perfection—a standard of care not sanctioned by the cases. As was said in *The Tawmie*, 80 F. (2d) 792, 793 (5th Circ., 1936):

> "Though shipowners are held to a strict degree of diligence, seaworthiness does not require absolute perfection, nor are owners held to the duty of furnishing appliances having the highest known degree of safety. It is sufficient if the equipment be that which is reasonably fit and safe for its purpose, and reasonably adequate to the place and occasion where used by direction of the owners."

See also *The Cricket*, 71 F. (2d) 61, 63 (9th Circ., 1934).

To the same effect is *Phillips* v. *Chicago, Burlington & Quincy R. Co.*, 119 Neb. 182, 227 N. W. 931 (1929), where the Court reversed a judgment premised on the proposition that it was negligence to furnish a track-repairer a pick instead of tie-tongs, and said (p. 184):

> "We must determine whether the furnishing of one tool for the work rather than another was such negligence as would sustain a verdict for the plaintiff. The employer is not bound to supply the best, the newest, or the safest tools to insure the safety of his employee. It is his duty to use all reasonable care and prudence for the safety of his employees, by providing them with machinery and tools reasonably safe and suitable for the use to which they are to be put."

See also *Marsh* v. *Chickering*, 101 N. Y. 396, 400 (1886).

Furthermore, it should not be forgotten that plaintiff based his case solely on the condition of the particular wrench he had in his hand, and not on the defendant's failure to supply a wrench of another and different type (R. 13, 15; *ante*, pp. 4-5). And in view of his twenty years experience on municipal ferryboats, doing this kind of work, it is of real significance that it never appeared to him necessary to have at his disposal another type of wrench. The record shows he never asked for any other (R. 14, 15).

Conclusion.

The judgment below should be affirmed.

February 11, 1942.

WILLIAM C. CHANLER,
Corporation Counsel
of the City of New York,
Counsel for Respondent.

PAXTON BLAIR,
ALFRED T. WHITE,
LEON SHAW,
of Counsel.

LAWYERS PRESS, INC., 165 William St., N. Y. C.; 'Phone: BEekman 3-2300

SUPREME COURT OF THE UNITED STATES.

No. 589.—October Term, 1941.

William Jacob, Petitioner, vs. The City of New York.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 30, 1942.]

Mr. Justice Murphy delivered the opinion of the Court.

The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts. The present case is a suit by petitioner under the Jones Act[1] for personal injuries sustained when he fell because the wrench he was using to tighten a nut slipped under the torque applied to it. We are called upon to determine whether on the evidence adduced by petitioner, and in contravention of accepted juridical standards, petitioner was wrongfully deprived of his statutory right to jury trial by the action of the trial court in dismissing his complaint,[2] thereby refusing to submit the case to a jury which had been duly empanelled to try it. In holding that petitioner had failed to prove facts sufficient to warrant submitting the issue of respondent's negligence to the jury, the trial court relied on the so-called simple tool doctrine. The

[1] 41 Stat. 988, 1007, 46 U. S. C. § 688.

[2] The complaint set forth two causes of action—the first for personal injuries and the second for maintenance and cure. Respondent moved to dismiss only the first cause of action. At the same time, in settlement of the second cause of action, respondent offered to consent to judgment for loss of wages from the time of the accident until petitioner returned to work. This offer was refused by petitioner's counsel and the second cause was thereupon dismissed. The Circuit Court of Appeals, sua sponte, directed that judgment be entered on the second cause of action for petitioner in the amount admitted to be due from respondent. That judgment is not in issue here. Only the first cause of action, that for personal injuries, survives for our consideration.

Circuit Court of Appeals affirmed. 119 F. 2d 800. The novel questions thus presented in the administration of the Jones Act prompted us to grant certiorari. 314 U. S. —.

Petitioner's testimony[3] is the complete answer to the question whether the case should have been taken from the jury. The gist of that testimony is as follows: For three weeks prior to the accident petitioner, an employee with twenty years' experience, had been serving as water-tender in charge of the fire-room on the "Dongan Hills", a ferry-boat operated by respondent between Staten and Manhattan Islands in New York harbor. One of his duties was to change oil strainers. This was done about three times a week and required the removal and replacement of a manifold head, housing the strainers, which was held in place by six studs and nuts. When the manifold was replaced, the nuts had to be very tight. The best tool to remove and to tighten the nuts was a straight end wrench fitting a 1¼" nut. Petitioner used an S-shaped end wrench of the proper size which was "well worn", "had seen a lot of service", was "a loose fit", and "had a lot of play on it". There was about one-sixteenth of an inch "play in the jaws; it was worn." The wrench was about eighteen inches long and the "play" at the end was "about an inch". Petitioner asked the chief engineer for a new wrench three times, the first request being when petitioner first had occasion to use the worn wrench to change an oil strainer, and the last two or three days before the accident. In answer to this last request the chief engineer "said for me [petitioner] to look in the tool closet and see if there was one in there; and I went up there and couldn't find any and I believe he said he sent an order out for one." The regular way of requisitioning needed tools was by a report to the chief engineer. All petitioner was supposed to do was order; he did not know what respondent kept in its storeroom. The "Dongan Hills" docked at Manhattan Island on the average of six or seven times each day. On the day of the accident petitioner did not renew his request, but he did look in the chief engineer's tool set. He found no end wrench of the proper size, did not know if a Stillson wrench was there, but believed that a monkey wrench was. A monkey wrench could

[3] Petitioner was the sole witness in his own behalf. The trial court did not allow an opinion witness, called for the purpose of establishing the best type of wrench for the work petitioner was doing at the time of the accident, to testify.

"probably" be used on any nut. At the time of the accident petitioner was using the worn, S-shaped, end wrench to tighten the nuts after changing the oil strainer. There was about five-eighths of an inch of thread on the studs, and petitioner had changed the wrench on one nut four times. As he started the fifth tightening, the wrench slipped, causing him to fall from the eighteen inch square platform on which he was standing to the catwalk eighteen inches below. In the course of the fall petitioner sustained an injury to his right side which struck an angle iron alongside the catwalk.

The Jones Act, in addition to giving injured seamen the right to trial by jury in actions arising under the Act, also incorporates "all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees". Among such statutes is 45 U. S. C. § 51 which provides in part that a carrier is liable for "injury or death . . . by reason of any defect or insufficiency, due to its [the carrier's] negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment".

Although proof of negligence is an essential to recovery under the Jones Act, *Kunschman* v. *United States*, 54 F. 2d 987; cf. *Beadle* v. *Spencer*, 298 U. S. 124, 128, contributory negligence and assumption of risk are not available defenses. The admiralty doctrine of comparative negligence applies. *Socony-Vacuum Co.* v. *Smith*, 305 U. S. 424. The salient points of petitioner's testimony, summarized above, made a sufficient showing to allow the jury to consider the issue of respondent's negligence. The wrench petitioner was using had become defective for the purpose for which it was designed. After discovering that defect petitioner made three requests to the proper person, the chief engineer, for a new wrench. The first of those requests was about three weeks prior to the accident, the last but two or three days before it occurred. At that time the chief engineer said he sent out an order for one, but it was not forthcoming in the two or three days intervening before the accident despite the fact that the "Dongan Hills" docked at Manhattan Island six or seven times a day. While the best tool for doing the work was a straight end wrench of the proper size, petitioner had access to a monkey wrench which "probably" could be used on any nut. We think these facts entitled petitioner to have the jury

consider whether his injury was caused by any "defect or insufficiency, due to its [respondent's] negligence, in its appliances". That is to say, it was for the jury to decide whether a monkey wrench was a reasonably safe and suitable tool for petitioner's work, whether respondent's failure, although it had at least two days' and possibly three weeks' notice of the defect, to supply petitioner with a new wrench amounted to negligence on its part, and whether respondent, after it had knowledge of the defect, might not have reasonably foreseen the possibility of resulting harm if it allowed the worn wrench to remain in use. Cf. *Socony-Vacuum Co.* v. *Smith, supra.* Without doubt the case is close and a jury might find either way. But that is no reason for a court to usurp the function of the jury. We are satisfied that a due respect for the statutory guaranty of the right of jury trial, with its resulting benefits, requires the submission of this case to the jury.

The simple tool doctrine, used by the courts below to bolster their belief that the evidence was insufficient, does not affect our conclusion. In the first place, the contrariety of opinion as to the reasons for and the scope of the simple tool doctrine, and the uncertainty of its application,[4] suggest that it should not apply to cases arising under legislation, such as the Jones Act, designed to enlarge in some measure the rights and remedies of injured employees.[5] But even assuming its applicability, the doctrine does not justify withdrawing this case from the jury. For the only possible basis for the doctrine which is compatible with the provisions and policy of the Jones Act is that the master is not negligent in the case of defective simple tools because the possibility of injury from such tools is so slight as to impose no duty on him to see that they are free from defects in the first instance or to inspect them thereafter.[6] *Newbern* v. *Great Atlantic & Pacific Tea Co.*, 68 F. 2d 523; cf. *Hedicke* v. *Highland Springs Co.*, 185 Minn. 79, 239 N. W. 896—or to put it another way, the master is relieved of the duty to inspect simple tools

[4] See 3 Labatt, Master and Servant (2d ed.), pp. 2476-2484.

[5] Compare McCarthy v. Palmer, 113 F. 2d 721, with Spain v. Powell, 90 F. 2d 580.

[6] If the doctrine is but a phase of assumption of risk or contributory negligence, as has been suggested (see Labatt, *op. cit.*, pp. 2479, 2480, 2484), it is manifestly not applicable to actions under the Jones Act for those common-law affirmative defenses are not available in such actions. Socony-Vacuum Co. v. Smith, 305 U. S. 424.

for defects because the servant's opportunity for ascertaining such defects is equal to or greater than the master's. *O'Hara* v. *Brown Hoisting Mach. Co.*, 171 F. 394; *Miller* v. *Erie R. R. Co.*, 21 App. Div. (N. Y.) 45; 2 Agency A. L. I. § 503(d). Petitioner inspected the wrench, found it defective and then asked three times for a new one. This satisfied the burden of inspection placed on his shoulders by the doctrine, and it was then for the jury to say whether respondent's failure to comply with those repeated requests was negligence on its part. To deny petitioner the right to have the jury pass on that issue because of the simple tool doctrine is to say that doctrine relieves the master of any duty to furnish reasonably safe and suitable simple tools in spite of the fact that he knows they are defective, and requires the servant not only to inspect simple tools for defects, but also to supply his own simple tools when he finds those of the master defective. This is so obvious a perversion of the Jones Act as to require no comment.[7]

Since there must be a new trial we deem it appropriate to state that in our opinion no reversible error was committed when the trial court refused to allow opinion testimony as to the best type of tool for the work.[8] Respondent's duty was not to supply the best tools, but only tools which were reasonably safe and suitable. Cf. *The Tawmie*, 80 F. 2d 792; *The Cricket*, 71 F. 2d 61.

The judgment is reversed and the cause remanded to the District Court for further proceedings in conformity with this opinion.

So ordered.

Mr. Justice FRANKFURTER and Mr. Justice JACKSON concur in the result.

The CHIEF JUSTICE, Mr. Justice ROBERTS, and Mr. Justice REED are of opinion that the judgment below should be affirmed.

And, if the scope of the doctrine is that a master is under no duty to furnish reasonably safe and suitable simple tools (see Allen Gravel Co. v. Yarbrough, 133 Miss. 652, 98 So. 117; Middleton v. National Box Co., 38 F. 2d 89), the doctrine is hardly compatible with the scheme of the Jones Act fixing liability on a master for injuries caused by defects and insufficiencies in his appliances due to his negligence.

[7] See note 6, *ante*.

[8] See note 3, *ante*.